Office-Supreme Court, U.S.
FILED
OCT 24 1962
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962.

No. 553

ASSOCIATED TELEPHONE AND TELEGRAPH COMPANY,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 24, 1962

Pandick Press, Inc., 22 Thames St., New York 6, N. Y., U. S. A.

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OCTOBER TERM, 1962.

No.

ASSOCIATED TELEPHONE AND TELEGRAPH COMPANY,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner prays that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on July 30, 1962, which reversed the judgment of the United States District Court for the Southern District of New York.*

### Opinions Below.

The opinion of the United States Court of Appeals for the Second Circuit (Appendix B**) was filed on July

* This petition is not directed to the "consolida[illegible]turn" issue on which the Court of Appeals affirmed the Dis[illegible] Court and no further reference will be made to such issue herein.

** The appendices hereto will be referred to as "App.".

30, 1962, and is officially reported at 306 F. 2d 824. The opinion of the United States District Court for the Southern District of New York (pp. 64a-131a of the Joint Appendix* in the Court below) was filed on November 8, 1961, and is officially reported at 199 F. Supp. 452.

## Jurisdiction.

The judgment of the Court of Appeals (App. C) was entered on July 30, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. §§1254(1) and 2101(c).

## Question Presented.

Whether the term "dividends" as used in §902(a)** is intended to include *liquidating* dividends,*** so as to entitle a domestic corporation to a foreign tax credit for Canadian income taxes paid by a wholly-owned Canadian subsidiary corporation with respect to accumulated earnings and profits which were distributed to the domestic parent as a liquidating dividend.

## Statutes and Treaty Involved.

§§316(a), 331(a), 901(a), 901(b)(1), 902(a), 902(b) and 904(a) of the 1954 Code are involved and are set forth in App. A at pp. 1-3. Articles XI and XV of the Income Tax

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* The Joint Appendix in the Court below, nine copies of which were filed herewith, will be referred to as "Jt. App.".

** The section sign ("§") will be used with numerical references to designate sections of the Internal Revenue Code of 1954 (the "1954 Code"), unless otherwise indicated.

*** The term "liquidating dividends" is used herein to denote distributions in liquidation but only to the extent of earnings and profits accumulated after February 28, 1913,—thus excluding distributions from capital or paid-in surplus.

Convention between the United States and Canada (the "Treaty") and paragraph 7(c)* of the Protocol thereto are also involved and are set forth in App. A at pp. 4-5.

## Statement.

There is no dispute as to the facts all of which were stipulated by the parties (Jt. App. 42a-50a). The pertinent facts with respect to the question presented may be summarized as follows:

Petitioner's wholly-owned subsidiary Automatic Electric Company ("Automatic"), a Delaware corporation, with which petitioner filed a consolidated income tax return for the year 1954 (the taxable year involved herein), owned all of the outstanding stock of Filcrest Company Ltd. ("Filcrest"), a Canadian corporation which was liquidated in 1954. In the course of such liquidation, Automatic received a liquidating distribution from Filcrest in 1954 in the amount of $9,574,386.10 which included $6,322,088.64 of earnings and profits accumulated by Filcrest from Canadian sources subsequent to February, 1913 and with respect to which Filcrest has paid Canadian income taxes in the amount of $2,387,564.86. The gain realized by Automatic on the liquidation of Filcrest ($5,069,868.67) was reported on petitioner's 1954 Federal income tax return as a long-term capital gain. (Jt. App. 43a-45a.)

The distribution was treated as a "dividend" by Canada within the meaning of Article XI.2 of the Treaty, and was subjected to a 5% dividend withholding tax by the Canadian authorities. On its 1954 income tax return, petitioner likewise treated the portion of the distribution representing earnings and profits accumulated by Filcrest since

* Now paragraph 6(c).

February, 1913 as a "dividend" for purposes of §902(a)* and claimed a foreign tax credit under §901(a)* (as limited by §904(a))* for (i) the $2,387,564.86 of Canadian income taxes paid by Filcrest with respect to such accumulated earnings and profits and (ii) the Canadian 5% tax which was withheld from Automatic. (Jt. App. 45a-46a.)

The District Director of Internal Revenue allowed petitioner the credit as claimed for the 5% withholding tax paid to Canada, but denied petitioner any credit for the Canadian income taxes previously paid by Filcrest with respect to its accumulated earnings and profits on the ground that §902(a) is not applicable with respect to *liquidating* dividends. After payment of the deficiency asserted by the District Director, petitioner duly filed a claim for refund of the deficiency so paid. Upon rejection of such claim for refund by the District Director, petitioner sued for refund in the United States District Court for the Southern District of New York. The jurisdiction of the District Court was invoked under 28 U. S. C. §1346.

The District Court held that the liquidating dividend received by Automatic from Filcrest constituted a "dividend" within the meaning of §902(a), and that accordingly petitioner was entitled to the deemed paid credit for

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* Briefly, §§901(a) and 901(b)(1) allow United States taxpayers a credit (the "direct credit") for foreign income taxes paid directly by them. Under §902(a) a domestic corporation receiving a dividend from a foreign subsidiary is deemed to have paid the foreign income taxes previously paid by such subsidiary with respect to the accumulated profits distributed by such dividend,—thus entitling the domestic parent to a credit (the "deemed paid credit") for such foreign taxes under §901(a). §904(a) provides the only limitation on the amount of credit allowable under such sections, *viz.*, it prohibits the *aggregate* credit for taxes paid to any foreign country from exceeding an amount determined by applying the *overall* effective United States tax rate to the income from such foreign country.

Canadian income taxes paid by Filcrest with respect to the accumulated earnings and profits distributed to Automatic. In so holding, the District Court relied on (a) the *express statutory language* of §316(a)—defining the term "dividend" for the purpose of the entire income tax subtitle as including *any* distribution of earnings and profits accumulated after February 28, 1913 (Jt. App. 85a-90a, 106a-108a), (b) the fact that such literal construction effectuated the purpose of the foreign tax credit provisions to eliminate double taxation (Jt. App. 95a-96a, 102a), (c) the fact that this construction was in accord with the interpretation of other sections (including §§901(a), 902(b) and 904(a)) with which §902(a) is clearly in *pari materia* (Jt. App. 95a-96a, 97a-101a), and (d) the legislative history of the pertinent sections of the 1954 Code (Jt. App. 102a-106a).

The Court of Appeals below, reversing the judgment of the District Court, held that the foreign tax credit claimed by petitioner was not allowable. In so holding, the Court of Appeals rejected the arguments of both the petitioner and the respondent (App. B 6-16); appeared to disregard the clear language of the applicable statutory sections considered by the District Court; and, recognizing that there was no support for its decision either in the statute or the applicable legislative history, based its holding solely on a comparison of foreign tax rates and United States capital gains rates on liquidating dividends (App. B 17-18) and alleged possibilities of tax avoidance (App. B 18).* The Court of Appeals recognized that its decision

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* The Court of Claims in *Freeport Sulphur Co.* v. *U. S.*, 163 F. Supp. 648 (1958) and the Court of Appeals for the Seventh Circuit in *Fowler Hosiery Co., Inc.* v. *Comm'r.*, 301 F. 2d 394 (1962), also held that liquidating dividends do not qualify as "dividends" under §902(a). Though the reasoning by which such courts reached this result differed in each case, their decisions were also largely predicated upon a comparison of foreign and U. S. tax rates on

resulted in double taxation, and was inconsistent with the application of other sections of the statute, in particular §904(a).*

## Reasons for Granting the Writ.

### I.

### The Decision Below Conflicts with Rules Enunciated by This Court with Respect to the Meaning and Application of §316(a) and the Interpretation of §902(a) of the Internal Revenue Code of 1954.

The sole question presented is whether a liquidating dividend from a foreign subsidiary constitutes a "dividend" within the meaning of §902(a) so as to entitle the recipient of such distribution to a deemed paid credit for foreign income taxes paid by the foreign subsidiary with respect to the accumulated profits included in such distribution. There is no specific definition of "dividend" in §902 or in any of the other foreign tax credit provisions. However, there is a clearly expressed definition of "dividend" in §316(a), applicable to the entire income tax subtitle, including the foreign tax credit provisions.

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particular items of income and hypothetical possibilities of tax avoidance.

Previously, in the only article treating the specific issue in detail, the author concluded that liquidating dividends qualified as dividends for the purpose of §902(a). Beauregard, *Distributions in Liquidation as Dividends in the Foreign Affiliate Tax Credit of the 1954 Code*, 41 Virginia L. Rev. 731 (1955). The District Court in its decision below cited this article with approval (Jt. App. 107a).

* This is clear from its references in the last paragraph of its opinion (App. B 18-19) to Rev. Rul. 54-15, 1954-1 Cum. Bull. 129 and *Helvering* v. *Campbell*, 139 F. 2d 865, 870 (4th Cir., 1944) which hold that subject to the limitation of §904(a), a taxpayer may receive full credit for foreign "ordinary income" taxes on income taxable in the United States at lower capital gains rates.

**A. Conflict of the decision below with the rule of this Court in *Comm'r.* v. *Est. of Bedford*, 325 U. S. 283 (1945): The general definition of "dividend" in §316(a) by its clear terms is applicable to the entire income tax subtitle.**

Insofar as here material, §316(a) provides clearly and without qualification as follows:

> "*For purposes of this subtitle*, the term 'dividend' means *any* distribution of property made by a corporation to its shareholders—(1) out of its earnings and profits accumulated after February 28, 1913 . . ." (Emphasis added.)

On the basis of §316(a), it is clear that *any* distribution of such earnings and profits (including a liquidating dividend) qualifies as a "dividend" for the purpose of §902(a). However, the Court below did not discuss the effect of §316(a) upon the interpretation of §902(a).

*Comm'r.* v. *Est. of Bedford*, 325 U. S. 283 (1945), involved the tax consequences of an exchange of stock for cash and other stock which constituted a corporate "reorganization" as well as a "partial liquidation". This Court held that the exchange treatment for complete and partial liquidations (now §331(a)*) was "limited" in scope, and could not be carried over to restrict the meaning of "dividends" in the "reorganization" provisions, which operate independently of the "exchange" treatment provided for

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* Section 331(a) provides as follows:

"(a) GENERAL RULE—

(1) COMPLETE LIQUIDATION.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock.

(2) PARTIAL LIQUIDATIONS.—Amounts distributed in partial liquidation of a corporation (as defined in section 346) shall be treated as in part or full payment in exchange for the stock."

liquidations. This Court further held that the general definition of "dividend" (now contained in §316(a)) is *not* so limited but defines "dividend" for the purpose of the whole income tax title, and such definition is therefore "infused" into the reorganization provisions. See 325 U. S. at 291-292.

As in the case of the "reorganization" provisions involved in the *Bedford* case, the foreign tax credit provisions of the income tax subtitle of the 1954 Code (Subpart A of Part III of Subchapter N of Chapter 1) are in an independent subpart of the 1954 Code. Under the rule in the *Bedford* case, therefore, the broad statutory definition of the term "dividend" in §316(a) must be regarded as "infused" into §902(a) of the foreign tax credit subpart; and the decision of the Court of Appeals below is clearly in conflict with the rule of this Court as enunciated in that case.*

**B. Conflict of the decision below with the rule of this Court in *American Chicle Co.* v. *U. S.*, 316 U. S. 450 (1942): §902(a) should be interpreted as written to avoid double taxation.**

The *American Chicle* case is the only decision of this Court interpreting the language in §902(a). With respect to its predecessor sections, this Court stated that their purpose is to *"avoid double taxation"*, that *"the statute, as written, accomplishes that result"*** and relied on "the

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* This analysis is supported by the legislative history of §902(a), discussed herein at pp. 18-19, *infra*.

** That the purpose of the deemed paid credit provision is to avoid double taxation is clear from the legislative history of the original predecessor of §902(a), *viz.*, §238(c) of the Revenue Act of 1921, c. 136, 42 Stat. 227 (the "1921 Act"). See 61 Cong. Rec. 7184 (1921).

**The literal construction of the statute urged by petitioner herein is the only one which accomplishes the result of avoiding double taxation.**

plain terms of the Act." 316 U. S. at 452, 453. (Emphasis added.)

Although the Court below recognized that its decision resulted in double taxation (App. B 18), it nevertheless refused to allow the deemed paid credit with respect to liquidating dividends. It reached such result solely because such distributions were then taxable in the United States at capital gains rates which it assumed were generally lower than the foreign tax rates on earnings of foreign subsidiaries,—and without regard to the purposes of §902(a). Thus, its decision is in conflict with the rule of this Court in the *American Chicle* case that the *foreign tax credit provisions, and §902(a) in particular, should be construed in such a way as to avoid double taxation.*

## II.

## The Decision Below Conflicts with Rules Enunciated by This Court in *Bingham Tr.* v. *Comm'r.*, 325 U. S. 365 (1945) and *Merrill* v. *Fahs*, 324 U. S. 308 (1945): Clearly Related Sections of Tax Statutes Should Be Construed in *Pari Materia.*

### A. §902(a) is clearly related to §§901(a) and 904(a) and should have been construed in *pari materia* therewith by the Court below.

Neither the Court below, nor the courts in *Freeport Sulphur Co.* v. *U. S.*, 163 F. Supp. 648 (Ct. Cl. 1958) and *Fowler Hosiery Co., Inc.* v. *Comm'r.*, 301 F. 2d 394 (7th Cir. 1962), in their concern with differences between foreign tax rates and United States tax rates on the items of income in question, recognized the significance of §904(a) which applies to both the direct credit and the deemed paid credit and was intended by the Congress as the *only* limi-

tation designed to take care of any disparity between foreign tax rates and United States tax rates.

For the year 1954, §904(a) provided a "per-country" limitation on the amount of the foreign tax credit otherwise allowable. Under such per-country limitation, the amount of the foreign tax credit (whether direct or deemed paid) which may be claimed by a taxpayer with respect to any foreign country "shall not exceed the same proportion of the tax against which such credit is taken [i.e., the United States income tax] which the taxpayer's taxable income from sources within such country . . . bears to his entire taxable income for the same taxable year." §904(a) is obviously closely related to and in *pari materia* with the deemed paid credit computed under §902(a) as well as the direct credit computed under §901(b)(1).

The application of the §904(a) limitation has been well established for many years. It has been repeatedly held by the courts as well as the Internal Revenue Service that the §904(a) limitation is to be applied according to its clear and express terms, and as the only limitation intended by the Congress with respect to foreign tax credits. *Helvering* v. *Campbell*, 139 F. 2d 865 (4th Cir. 1944); *I. B. Dexter*, 47 B. T. A. 285 (1942), Acquiescence 1948-2 Cum. Bull. 1; *James H. Brace*, 11 T. C. M. 906 (1952); Rev. Rul. 54-15, 1954-1 Cum. Bull. 129. The "per country" limitation in §904(a) requires only a comparison of the *overall effective* tax rate of the foreign country involved with the *overall effective* United States tax rate as applied to the foreign source income. It prevents the credit for foreign taxes from exceeding the *overall effective* United States tax rate as applied to the foreign income involved. And, to the extent that a taxpayer has income taxable under the United States law at capital gains rates, the overall effective United States tax rate (as well as the limitation) is auto-

matically and correspondingly reduced below the rate applicable to ordinary income items. There is nothing in §904(a) suggesting that Congress intended to *eliminate* a credit for items taxed as ordinary income abroad merely because they are taxed in the United States at capital gains rates; and the *Campbell, Dexter,* and *Brace* cases, *supra,* as well as Rev. Rul. 54-15, *supra,* demonstrate that the Congress did not intend* to *disallow* a credit merely because *a particular item* of foreign income has been subjected to a higher foreign tax rate than the United States rate specifically applicable with respect thereto.

The Court below acknowledged this established interpretation of §904(a) (App. B 18-19), as it was obliged to do under the "legislative reenactment" rule of statutory construction enunciated by this Court (and followed by the District Court below, Jt. App. 99a-101a). But, instead of taking such established interpretation of the §904(a) limitation into account in interpreting §902(a) in accordance with the *pari materia* rule enunciated by this Court in the *Bingham* and *Merrill* cases, *supra,* the Court below proceeded to construe §902(a) without regard to §904(a); and purported to justify such action with the statement that "the Internal Revenue Code is not a high precision instrument" (App. B 19).

**B. §902(a) is clearly related to §902(b), and should have been construed in *pari materia* therewith by the Court below.**

As the District Court indicated in its opinion below (Jt. App. 95a-96a), §902(b) is of significance in the interpretation of the term "dividends" as used in §902(a).

* The reenactment of §904(a) in 1954 after the *Campbell, Dexter* and *Brace* decisions and Rev. Rul. 54-15 *supra,* constitutes Congressional approval of such interpretation of §904(a) under the principles set forth by this Court in *Cammarano* v. *U. S.*, 358 U. S. 498 (1959) and *Helvering* v. *Winmill,* 305 U. S. 79 (1938).

§902(b) extends the scheme of §902(a) by providing a deemed paid credit for foreign income taxes paid on the earnings of a foreign subsidiary (S-2) of a foreign subsidiary (S-1) where the earnings of S-2 are distributed to S-1 as a "dividend", and in turn distributed by S-1 to its domestic parent as a "dividend". In the case of both §§902(a) and 902(b), the criterion for the credit is the *remittance* of the earnings in question by way of "dividends" to the domestic parent. Since the dividends from S-2 to S-1 are not taxable at all under United States law, the question whether such dividends are liquidating dividends or ordinary dividends is completely immaterial. For example: Assume a case in which S-2 is liquidated into S-1 and earnings of S-2 on which a foreign income tax has been paid are distributed to S-1 on such liquidation. If such earnings and profits are in turn remitted by S-1 to its domestic parent as a "dividend", it is obvious (as the Court below seemed to acknowledge) that the Congressional purposes underlying §902(b) would be best effectuated by the allowance of a deemed paid credit for the foreign taxes previously paid by S-2.

Here again, under the well-established rule of construction enunciated by this Court in *Bingham Tr.* v. *Comm'r.*, 325 U. S. 365 (1945) and *Merrill* v. *Fahs*, 324 U. S. 308 (1945), two subsections as closely related as §§902(a) and 902(b) must be considered in *pari materia*, and any doubt as to the meaning of the term "dividends" in §902(a) should have been resolved in conformity with the meaning Congress must *necessarily* have intended for the term "dividends" in §902(b)—particularly when such meaning serves the admitted purposes of both sections, *viz.*, the elimination of double taxation. In complete disregard of such rule of construction, the Court below, in effect, treated §902(b) as irrelevant.

**C. The foreign tax credit provisions of the 1954 Code (including §902(a)) are closely related in purpose to the Income Tax Convention between the United States and Canada and should have been considered in *pari materia* therewith by the Court below.**

The Court below in footnote 2 of its opinion (App. B 4) stated:

> "The Commissioner allowed the $283,396.13 credit claimed by the taxpayer for the 5% Canadian dividend withholding tax paid on the liquidating distribution. It is not involved in the present litigation *except as it may throw light on the foreign tax credit claimed by Associated but disallowed by the Commissioner.*" (Emphasis added.)

The liquidating dividend in question was treated as a "dividend" by Canada within the meaning of Article XI.2 of the Treaty. Paragraph 7(c) of the Treaty Protocol and §7.31(b) of the United States Treasury Department Regulations interpreting the Treaty* both define the term "dividends" for purposes of the Treaty to include "all distributions of the earnings or profits of corporations"; and neither contains an exception for liquidating dividends. It was by virtue of such definition in the Treaty that Canada was limited, for the year in question, to the 5% dividend withholding tax on the liquidating dividend in issue herein.

If the liquidating dividend in question must be regarded by Canada as a "dividend" within the meaning of Article XI of the Treaty, it would seem appropriate and in line with the established doctrine of mutuality and reciprocity under such treaties similarly to treat the distribution as a "dividend" for purposes of §902(a).

While Article XV (which allows credit for Canadian taxes "in accordance with the provisions of the United States Internal Revenue Code") may prevent such defini-

* T. D. 5206, 1943-1 Cum. Bull. 526, 539.

tions from *controlling* the issue presented here (without regard to the 1954 Code),* it is submitted that the Treaty (designed as it is to eliminate double taxation on a mutually reciprocal basis and to harmonize the taxation principles of the two countries) must also be considered in *pari materia* with §902(a). As indicated, the Court below did refer to the 5% Canadian dividend withholding tax paid on the liquidating distribution, and the possibility of it throwing "light" on this question, but failed to give any consideration to the effect of the Treaty on the interpretation of §902(a), in conformity with the *ratio decidendi* of *Bingham Tr.* v. *Comm'r.*, 325 U. S. 365 (1945) and *Merrill* v. *Fahs*, 324 U. S. 308 (1945).

## III.

## The Decision Below Conflicts with the Rule Enunciated by this Court That Courts May Not Add to or Alter Statutory Language.

### A. Conflict of the decision below with the principles enunciated by this Court in *Hanover Bk.* v. *U. S.*, 369 U. S. 672 (1962) and *Lewyt Corp.* v. *Comm'r.*, 349 U. S. 237 (1955): Courts may not, by judicial legislation, deny benefits of which they disapprove.

Contrary to the mandates repeatedly expressed by this Court, the Court below, as well as the courts in *Freeport Sulphur Co.* v. *U. S.*, 163 F. Supp. 648 (Ct. Cl. 1958) and *Fowler Hosiery Co., Inc.* v. *Comm'r.*, 301 F. 2d 394 (7th Cir.

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* Article XVII of the Treaty reserves to the United States the right to include in the basis upon which its taxes are imposed all items of income of its citizens, residents and corporations as though the Treaty had not been adopted; but to the extent that such Article is relevant, it merely duplicates the Code reference in Article XV. Cf. §7852(d) which provides that no provisions of the 1954 Code shall be applied in a manner inconsistent with any treaty obligation of the United States.

1962), in effect, changed (or at least read additional language into) the statutory language to effectuate a result of which they approved, rather than leaving changes in the statute to the Congress.

In the *Hanover Bk.* case, *supra*, this Court stated with reference to the interpretation of a tax statute:

> ". . . Under such circumstances we are not at liberty, notwithstanding the apparent tax-saving windfall bestowed upon taxpayers, to add to or alter the words employed to effect a purpose which does not appear on the face of the statute. • • • Nevertheless, the Government now urges this Court to do what the legislative branch of the Government failed or elected not to do. This, of course, is not within our province.[23]

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> "[23] We believe the Court of Appeals for the First Circuit was correct when it said in *Fabreeka Products Co.* v. *Commissioner*, 294 F. 2d 879: 'Granting the government's proposition that these taxpayers have found a hole in the dike, we believe it one that calls for the application of the Congressional thumb, not the court's.' See also *Evans* v. *Dudley*, 295 F. 2d 713, 715, where the Third Circuit quotes this language from Judge Aldrich's opinion in *Fabreeka Products*." 369 U. S. at 687-688.

And in the *Lewyt* case, *supra*, this Court stated:

> ". . . But where the benefit claimed by the taxpayer is fairly within the statutory language and the construction sought is in harmony with the statute as an organic whole, the benefits will not be withheld from the taxpayer though they represent an unexpected windfall." 349 U. S. at 240.

The benefits petitioner seeks are "fairly within the statutory language." Filcrest's liquidating dividend falls squarely within the statutory definition of "dividend" prescribed in §316(a) for purposes of the entire income tax

subtitle of the 1954 Code. Petitioner's construction of §902(a) is also "in harmony with the statute as an organic whole" when proper consideration is given to the various provisions of the 1954 Code and the Treaty which are clearly in *pari materia* with such section.

The Court below, however, rather than addressing itself to the language and scheme of the sections granting and limiting the foreign tax credit or to their primary purpose of avoiding double taxation, concerned itself mainly with the assumptions that (i) foreign tax rates on ordinary income are generally higher than the United States capital gains rate (App. B 17), and (ii) an allowance of the credit in this case "would facilitate a convenient scheme for avoiding the United States income tax." (App. B 18) The Court refers to the possibility that a domestic corporation could set up one or more foreign subsidiaries for the purpose of accumulating earnings and then liquidate such subsidiaries at capital gains rates to secure the benefits of the foreign tax credit against other income. However, any such tax avoidance schemes would clearly come within the prohibition of §269 which would deny a taxpayer a tax credit with respect to a corporation control of which is acquired for the principal purpose of evasion or avoidance of Federal income taxes. There is absolutely nothing in the record of this case to indicate that Filcrest was organized or liquidated for tax avoidance purposes, nor has respondent ever made any such suggestion. Moreover, the Court below—in its assumption that taxpayers would be encouraged to set up foreign corporations and liquidate such corporations for the purpose of obtaining the deemed paid credit—disregarded the economic realities of business investments in foreign countries which involve substantial amounts of money and effort as well as risks of fluctuating currency exchange rates, blocked currency and expropriation.

The Court's assumption that petitioner had a choice to pay out the earned surplus of Filcrest as ordinary dividends is without merit. This is precisely what the taxpayer attempted to do in *Fowler Hosiery Co., Inc.* v. *Comm'r.*, 301 F. 2d 394 (7th Cir. 1962)—but without success. It is a well established principle of law that once a decision has been made to liquidate a corporation, all subsequent distributions by such corporation in pursuance of that decision will be treated as *liquidating distributions*, even though cast *in the form of ordinary* dividends. Merten's, *Law of Federal Income Taxation* (Zimet, Stanley & Kilcullen Revision, 1962), Vol. I, §9.79. In any event, petitioner respectfully submits that what could or could not have been done by petitioner as an alternate course of procedure is hardly a valid reason for not applying the statute as written,—particularly when the statute as written effectuates the principal purpose of the foreign tax credit provisions of the law, *viz.*, the elimination of double taxation.

**B. Conflict of the decision below with the rule of this Court in *Helvering* v. *Bliss*, 293 U. S. 144 (1934) and *U. S.* v. *Pleasants*, 305 U. S. 357 (1939): One statutory provision granting tax relief is not modified by another provision granting tax relief, unless required by specific statutory language.**

In the *Bliss* case the Commissioner of Internal Revenue contended, in effect, that the enactment of capital gains relief for individual taxpayers had the effect of reducing the charitable deduction which would otherwise have been allowable to such taxpayers. In holding against the Commissioner, this Court stated:

> "The exemption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are

> not to be narrowly construed. Nor should the reduction in the rate of tax on capital gain, first granted in the Revenue Act of 1921, be held to circumscribe the privilege granted in the earlier Acts, and retained in later ones, with respect to charitable contributions, unless that result be plainly required by the language used." 293 U. S. at 150-151.

This same rule of statutory construction was reiterated by this Court in the *Pleasants* case; and was expressly followed by the District Court below in the instant case. (Jt. App. 82a-83a, 93a).

The original predecessor of §902(a) was enacted in substantially its present form as §238(e) of the 1921 Act.* Under §201(a) of such Act (now §316(a)), liquidating dividends were treated the same as ordinary dividends; and it is clear that the deemed paid credit provisions of such Act applied to liquidating dividends as well as ordinary dividends. Primarily with a view to providing "capital gains" relief to *individual* taxpayers in 1924, the Congress provided in §201(c) of the Revenue Act of 1924, c. 234, 43 Stat. 253 (the "1924 Act") that liquidating distributions should be treated as amounts received "in full payment in exchange for the stock". While this "exchange" treatment for liquidating distributions (now §331(a)) has continued to date,** *corporate* taxpayers did not become entitled to any

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* *American Chicle Co.* v. *U. S.*, 316 U. S. 450 (1942); Hearings on Revenue Revision before the House Committee on Ways and Means, 81st Cong., 2d Sess. 275 (1950); Jt. App. 79a.

** It was Respondent's principal argument in the Court below (as well as in the *Freeport* and *Fowler* cases, *supra*) that the "exchange" treatment enacted for corporate liquidations in the 1924 Act (and continued to date) had the effect of removing liquidating dividends from the meaning of the term "dividend" wherever used in the income tax law. However, this position was expressly rejected by the Court below (App. B 15-16). And, from the courts' opinions in the *Freeport* and *Fowler* cases, it is obvious that the position was equally unacceptable to them.

capital gains relief on such distributions until the enactment of the Revenue Act of 1942.* Such capital gains relief has continued to date for both corporate and individual taxpayers. But, as the District Court below found, there is nothing in the legislative history of either the 1924 Act or the 1942 Act or any subsequent revenue act indicating an intention on the part of the Congress through such enactment to curtail the deemed paid credit relief initiated for liquidating dividends in §238(e) of the 1921 Act (Jt. App. 93a, 106a).

As heretofore indicated (and in sharp contrast with the District Court's opinion herein), the decision of the Court below was based entirely upon the reduced tax rate now applicable with respect to long-term capital gains from corporate liquidations; and it is reasonably clear from the Court's opinion that its decision would have gone the other way had petitioner been required (as under pre-1942 law) to include the capital gain from Filcrest's liquidation as *ordinary* income.

In effect, therefore, the Court below, without any basis whatever in the statutory language or the applicable legislative history, interpreted the capital gains relief initiated for corporations generally in 1942, now provided by §331(a) (in conjunction with §§1201(a), 1221 and 1222), as adversely affecting the foreign tax credit relief provisions (§§901, 902, 904) which have been in the law since 1921. Such a holding is in direct conflict with the above described

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* §150(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798 (the "1942 Act"), amending §117(c) of the Internal Revenue Code of 1939 (now §1201(a)), extended to *corporations* generally the same ceiling rate (25%) on long-term capital gains which was previously provided for *individual* taxpayers.

rule of this Court as enunciated in the *Bliss* and *Pleasants* cases, *supra.**

## IV.

### The Question Presented Is of Fundamental and Continuing Importance to the Interpretation and Administration of the Foreign Tax Credit Provisions of the 1954 Code.

The applicability of the deemed paid credit may arise every time a domestic corporation partially or completely liquidates a foreign subsidiary which has paid income taxes to a foreign country. The possibility of continuing litigation of this question is heightened since the decision of the Court below, as well as the decisions of the Court of Claims and the Court of Appeals for the Seventh Circuit on this issue, were predicated upon a gratuitous comparison of the tax rates of the foreign country in question and the United States tax rate on the specific item of income. It is a matter of note that the Court of Claims in the *Freeport* case, *supra,* seemed influenced by the fact that the foreign tax rate in that case was *lower* than the applicable United States capital gain rate. On the other hand, the Seventh Circuit in the *Fowler* case, *supra,* and the Second Circuit in this case were influenced by the assumption that foreign tax rates were generally *higher* than the United States capital gains tax rates.**

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*Although this Court affirmed the court below in the *Bliss* case, it is noted that the writ of certiorari was granted therein notwithstanding the unanimity of opinion in the courts below (*viz.*, the United States Courts of Appeal for the First and Second Circuits and the United States District Court for the Northern District of Illinois) with respect to the question presented.

** See the pointed criticism of the decision of the Court below in 11 *U. S. Tax Week,* No. 33 (published by Fallon Law Book Co., Inc.), August 17, 1962, at pp. 1407 ff.

The effect of the decision of the Court below, as well as those of the Court of Claims in *Freeport* and the Seventh Circuit in *Fowler*, concededly is serious double taxation, and may substantially affect the decisions of United States business with respect to investments abroad. This is particularly true in respect of those foreign countries where changes in the political climate may require United States taxpayers to liquidate their corporate investments therein. Under the decision of the Court below, when such a liquidation takes place, a domestic corporate taxpayer will be subject to double taxation since it may well be liable for a United States income tax but will not secure a foreign tax credit for income taxes already paid by the foreign subsidiary to the foreign country. Petitioner respectfully submits that under the language of the present statute, the Congress intended that such double taxation be prevented by §§901 and 902 and the income tax treaties with Canada and other foreign countries.

The question presented herein is obviously a fundamental one, of great importance to the administration of the tax laws and with serious and far-reaching consequences to the transaction of United States business abroad and should be finally settled by this Court.*

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* Compare *Cammarano* v. *U. S.*, 358 U. S. 498 (1959) in which this Court granted certiorari on taxpayers' petitions from the decisions of the Courts of Appeal for the Eighth and Ninth Circuits, both of which reached the same results, "because of the recurring nature of the question, and because of its importance to the proper administration of the Internal Revenue laws."

## Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 24, 1962.